No. 20904

United States Court of Appeals

FOR THE NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, a corporation, formerly WARD INDUSTRIES CORPORATION,

Appellant,

vs.

UNION TANK CAR COMPANY, a corporation,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

REPLY BRIEF OF APPELLANT, DRAGOR SHIPPING CORPORATION

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The Position of Union Upon This Appeal

The brief filed by Union upon this appeal is founded entirely upon its total repudiation of the solemn representations of fact and law with which it had urged this Court, in March of 1965, to deny Dragor's application for a writ of prohibition for the purpose of reviewing, before Dragor was forced to file a compulsory counterclaim, the Arizona District Court's unconstitutional assumption of jurisdiction over the person of Dragor in this action.[1]

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[1] On April 7, 1966, this Court unanimously held that the Arizona District Court never acquired any jurisdiction over the person of Dragor in this case (361 Fed (2d) 43). On October 10, 1966, the United States Supreme Court denied Union's application for a writ of certiorari to review that decision.

At that time, this Court was assured by Union, in the most absolute of terms, that the apprehension voiced by Dragor in its application for this Court's interlocutory review was wholly unfounded; that "the authorities hold *without exception* that the pleading of a compulsory, as distinguished from a permissive, counterclaim constitutes no waiver of a previously asserted jurisdictional defense"; and that the waiver which might result from the filing of a *permissive* counterclaim which a defendant voluntarily elects to assert could not possibly apply to Dragor's *compulsory* counterclaim in this case, "since defendant has no choice but is *coerced* into asserting his claim as a counterclaim" (Union Statement of Points and Authorities, pp. 21-24).[2]

Having advised this Court at that time that the issue is one "with respect to which there is no conflict of authority" and having thereby succeeded in forcing Dragor to interpose its compulsory counterclaim, Union now blandly informs this Court, in a complete volte-face, that "Dragor's action in filing a counterclaim was voluntary" and that it thereby voluntarily "submitted" to the *in personam* jurisdiction of the Arizona District Court (Union Brief, p. 22).

In seeking this Court's approval of its proposed entrapment of Dragor and the destruction of its constitutional rights, Union has distorted the record, misstated the cases, and attempted to obliterate the distinction between compulsory and permissive counterclaims effected by Rule 13 of the Federal Rules of Civil Procedure. In addition, it presents a new theory of a divisible and fragmentary in *personam* jurisdiction which has never before been voiced,

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[2] Union's Statement of Points and Authorities submitted in opposition to Dragor's application for a writ of prohibition in this Court will hereafter be designated as Union Statement.

let alone supported, by any competent constitutional authority.

We now turn to a critical analysis of the arguments which Union offers in its brief upon this appeal to sustain the precise opposite of the factual and legal position which it had induced this Court to accept in March of 1965.

POINT I

Union is judicially estopped to repudiate its prior representations to this Court, upon Dragor's application for a writ of prohibition, that the involuntary filing of a compulsory counterclaim would not constitute a submission to the previously challenged jurisdiction of the Arizona District Court over the person of Dragor.

In our opening brief (pp. 7-12), we described Dragor's unremitting and unsuccessful efforts to procure this Court's review of the erroneous decision by the Arizona District Court denying Dragor's motion to quash the service of process herein before Dragor was required, under the Federal Rules of Civil Procedure, to file its answer to the plaintiff's complaint. We emphasized the apprehension which Dragor repeatedly expressed, both in this Court and the Court below, that the pleading of a compulsory counterclaim, though involuntary and coerced, *might* be deemed a waiver of its previously asserted objections to the *in personam* jurisdiction of the District Court.

In the District Court, Dragor had expressed that concern as follows (R. 1, pp. 89-90):

> "Under Rule 13(a), Ward will be compelled, if the action continues in this Court, to file its counterclaim as a compulsory counterclaim. If it does not do so, that counterclaim may be deemed forever waived. If such a counterclaim is filed, I am advised by counsel

> that the interposition therof, even though it be a compulsory counterclaim, may automatically constitute a waiver of any objections to the jurisdiction of this Court over the person of the defendant which may be set forth in the answer or which may have been taken previously by motion."

Upon its application to this Court for a writ of prohibition, Dragor had reiterated its concern in the following language (Dragor's Statement of Points and Authorities, pp. 11-12):[3]

> "Under the decisions of federal courts in several jurisdictions, an objection by a defendant to jurisdiction is waived by the act of that defendant in pleading a counterclaim for affirmative relief.
>
> * * *
>
> There are decisions, such as *Hasse* v. *American Photograph Corp.,* 299 F. 2d 666 (10 Cir. 1962), indicating that such is not the result of pleading a compulsory Counterclaim. *Petitioner has not found any decision in the Ninth Circuit on such a matter.* Under the circumstances, petitioner-defendant should not be required to incur the risk that the filing of its counterclaim would estop and preclude petitioner from preserving and raising its jurisdictional objections by appeal, or otherwise, after final judgment." (Italics ours)

Both in this Court and the Court below, Union unequivocally declared that the involuntary interposition of a compulsory counterclaim by Dragor could not possibly effect a waiver of its jurisdictional objections or constitute a submission to the *in personam* jurisdiction of the District Court. Quoting Barron and Holtzoff, and a host of

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[3] Dragor's Statement of Points and Authorities upon its application to this Court for a writ of prohibition will hereafter be designated as Dragor Statement.

cases, it underscored the difference between a compulsory and permissive counterclaim, emphasizing the fact that a compulsory counterclaim, filed under the compulsion of Rule 13, FRCP, could not possibly be deemed a voluntary submission to the *in personam* jurisdiction of the District Court under Rule 12, FRCP (Union Statement, pp. 21-24).

Citing *Hasse* v. *American Photograph Corporation,* 299 F. (2d) 666 (10th Circ., 1962), and distinguishing the cases cited by Dragor, it concluded that (*Ibid.*, p. 22):

> ". . . the authorities hold without exception that the pleading of a compulsory, as distinguished from a permissive, counterclaim constitutes no waiver of a previously asserted jurisdictional defense."

Having effected its then objective and coerced Dragor into the filing of its compulsory counterclaim, Union now engages in a complete somersault, without even a pretense of justification or explanation therefor. It now offers as truth what it previously denounced as error. It now condemns as error what it previously affirmed as true. There is no longer, according to Union, any difference between a compulsory and a permissive counterclaim. In its view, Rules 12 and 13, FRCP, do not exist. *Barron* and *Holtzoff* are turned up side down. "Dragor's action in filing a counterclaim," we are now told, was "voluntary". (Union's Brief, p. 22).

To apprehend the full import of Union's total repudiation of its prior affirmations, a comparison of the contents of its present and prior briefs will prove illuminating:

(1) *Hasse* v. *American Photograph Corporation,* 299 F. (2d) 666 (10th Circ., 1962): In its former brief submitted in opposition to Dragor's application for a writ of prohibition, this Court was told that the Tenth Circuit's

decision in *Hasse* was a "square holding on the point here in question" (Union Statement, pp. 22-23). Union quoted therefrom at pp. 668-669 as follows (Union Statement, p. 23):

> ". . . To hold that the defense of lack of jurisdiction of the person is waived by asserting a compulsory counterclaim would do violence to the purpose of Rule 12 in negativing the necessity of special appearances."
>
> "Since appellant had no alternative but to submit his claim against the plaintiff along with his defense to appellee's complaint, *we hold that such compulsion did not constitute* a waiver of his jurisdictional defense." (Italics ours.)

In its present brief, this Court is now informed that the *Hasse* decision is no impediment to a holding that the interposition of a compulsory counterclaim constitutes a waiver of previously or simultaneously asserted jurisdictional objections and a submission to the *in personam* jurisdiction of the District Court (Union's Brief, p. 23).

(2) *The authorities cited by Dragor:* Upon its application for a writ of prohibition, Dragor cited three decisions (Dragor Statement, p. 12) which indicated the possibility that the interposition of a compulsory counterclaim in its answer, though involuntary, might be deemed a waiver of its *in personam* jurisdictional objections. *North Branch Products, Inc.* v. *Fisher,* 284 F. (2d) 611, 615 (Ct. App., D. C. 1960); *Reubens* v. *Ellis,* 202 F. (2d) 415 (5th Cir., 1953); *Hook & Ackerman, Inc.* v. *Hirsh,* 98 F. Supp. 477 (D. Ct., D. Col. 1951).

In opposition, at that time, Union declared that those decisions were, in fact, in accord with the decision of the

Tenth Circuit in *Hasse*. Thus, it stated (Union Statement, pp. 23-24):

> "The three cases cited by petitioner (Statement, p. 12) *do not support* any different rule. * * *
>
> *North Branch* is in complete accord with the Tenth Circuit decision in *Hasse*. There a waiver was held to have occurred because defendant's jurisdictional defense was raised by motion long *after* it had filed its answer and counterclaim. The court nevertheless emphasized that no waiver would have occurred had defendant challenged the court's jurisdiction before filing its answer and compulsory counterclaim. . . .
>
> *Reubens* involved a similar situation in which the defendant sought to raise a venue objection long *after* answering and filing a counterclaim.
>
> In *Hook* the District Court for the District of Columbia commented that the liberality afforded by the Federal Rules in permitting joinder of a jurisdictional defense with a defense on the merits would not appear to extend to a situation in which a counterclaim is filed. *No distinction was made between a permissive and compulsory counterclaim.* This decision, to the extent inconsistent with the above authorities, in effect has been overruled by the subsequent decision of the Court of Appeals for the District of Columbia in the *North Branch* case." (Italics ours)

This Court is now told that the foregoing decisions, and more particularly *North Branch Products, Inc.* and *Hook and Ackerman, Inc.*, far from being inapplicable, do, in fact, support the "waiver" doctrine and do, in fact, confirm Dragor's "voluntary" submission to the *in personam* jurisdiction of the District Court (Union's Brief, p. 22).

(3) *Barron and Holtzoff*: On pages 22-23 of its present brief, Union quotes from Barron and Holtzoff, Federal Practice and Procedure, Vol. 1A, §370.2, p. 535, purporting to formulate the rule that "the assertion of a counter-

claim is a waiver today just as it would have been prior to the Rules." What Union does not advise this Court is that the paragraph of Barron and Holtzoff which it quotes *pertains solely and only to a permissive counterclaim and not a compulsory counterclaim.* It completely omits the paragraph immediately following the quoted paragraph, wherein the authors fully explain what is meant by the text which Union quotes. The following paragraph, *omitted by Union from its present brief,* was the very paragraph which it cited to this Court in its prior brief (Union Statement, p. 22):

> "'*What has been said so far deals only with the situation in which the counterclaim is permissive,* and where there is some justice in saying that defendant, by voluntarily invoking the jurisdiction of the court on his counterclaim, must be held to have waived his objections to jurisdiction or venue. *To apply such reasoning to compulsory counterclaims would be quite a different matter, since there defendant has no choice but is coerced into asserting his claim as a counterclaim.* . . . But to find waiver in these circumstances seems something less than fair play, and it is not required by the precedents prior to the rules, *where a compulsory counterclaim was unknown.* Thus there is merit in those cases which have drawn a distinction, and which have held that the assertion of a compulsory counterclaim is not a waiver of other defenses and objections joined with it.'"

We do not propose to comment upon the morality of Union's current maneuvers beyond recalling the trenchant words of Lord Kenyon "that a man should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations according to the promptings of his private interest" (quoted in *Smith* v. *Boston Elevated Ry. Co.,* 184 Fed. 387 at 389, [1st Circ., 1911]). Of a similar tactic, Chief Judge Hutcheson formulated the rationale of

judicial estoppel in *Livesay Industries* v. *Livesay Window Co.*, 202 F. (2d) 378 (5th Circ.) as follows:

> "Further, all questions of reported cases aside, it ought to be, we think it is, clear that, upon every principle of judicial estoppel, including the estoppel arising out of inconsistent positions in legal proceedings, defendant may not, as it attempts to do here, *so trifle with the judicial process.*
>
> By solemn affirmation in the patent office and thereafter by solemn affirmation in its pleadings prepared and filed by the same counsel who represents it in this suit, it affirmed the patentability of the invention and the validity of the patent. By evidence offered and argument made by the same counsel in support of that affirmation, it induced the district judge, upon full and careful consideration, as evidenced by his opinion in Livesay v. Drolet, D. C. 38 F. Supp. 885, to hold the patent valid and infringed. . . . Defendant ought to be, we think it is, *completely estopped from doing an about face in this case in the same court and forum and repudiating what it had before as solemnly affirmed there.*" (Italics ours)

Judge Hastie denounced a comparable tactic in *Scarano* v. *Central R. Co. of New Jersey*, 203 F. (2d) 510 (3rd Circ., 1953) with the following words:

> "A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position *may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention.* Such use of inconsistent positions would most flagrantly exemplify *that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate.* (Citing cases) *And this is more than an affront to judicial dignity.* For intentional self-contradiction is being used *as a means of obtaining unfair advantage* in a forum provided for suitors seeking justice." (Italics ours)

POINT II

Union's newly advanced argument that "Dragor's action in filing a counterclaim was voluntary" (Union's Brief, p. 22), and that Dragor thereby submitted its person to the jurisdiction of the Arizona District Court (Union's Brief, p. 22-23) is contrary to fact and erroneous in law.

A. *Union's Argument Is Contrary to Fact.*

In its comprehensive opinion upon the first appeal in this case (No. 20416), reversing the judgment entered by the Arizona District Court against Dragor on June 1, 1965 (361 F. 2d 43; cert. den. by the U. S. Supreme Court, October 10, 1966), this Court meticulously noted the successive measures which Dragor vainly invoked to record its unalterable objection to the *in personam* jurisdiction of the District Court and avoid the interposition of a compulsory counterclaim before its jurisdictional objections had been finally resolved. (Ib., p. 45).

This Court further noted that Dragor filed its answer only after all of these measures had failed; that, as an affirmative defense, it reiterated its position that the District Court had never acquired jurisdiction over its person (Ib., p. 45); and that, in setting forth its compulsory counterclaim, it alleged, as part and parcel thereof, in paragraph 18 of its answer (Ib., p. 45, footnote 2):

> "* * * that, to avoid a default in answering, the defendant herein has been compelled to file this counterclaim as a compulsory counterclaim under the Federal Rules of Civil Procedure; and that it is now filing the same herein without waiving or intending to waive the objections which it has heretofore raised and asserted, and has herein alleged, to the jurisdiction and venue of this court."

It is a measure of Union's indefensible position upon this appeal that it should have deemed it necessary to rely upon so unseemly a disregard of the record. We turn to a consideration of the legal hypotheses which Union has sought to fashion from a factually non-existent cloth.[4]

B. *Union's Argument Is Erroneous in Law.*

Union commences what purports to constitute a review of the law with what it characterizes as "the landmark decision in this field of law", the United States Supreme Court decision in *Merchants Heat and Light Co.* v. *Clow & Sons,* 204 U. S. 286 (Union Brief, p. 20). That decision was rendered in 1907, approximately 30 years before the Federal Rules of Civil Procedure became effective. Prior to the Rules, *"a compulsory counterclaim was unknown."* (Barron & Holtzoff, Federal Practice and Procedure, Vol. 1A, §370.2, p. 535). Any counterclaim, whether or not it arose out of the transaction set forth in the complaint, could be asserted in the action or not at the option of the defendant. If a defendant chose to plead a counterclaim, he voluntarily elected to become an actor in the litigation. He was, however, under no compulsion to do so.

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[4] Throughout the course of its brief, Union has deliberately sought to becloud the atmosphere upon this appeal by asserting, as "facts", statements pertaining to the events preceding the New York Settlement Agreement, as well as the Mosher law suit, which are completely baseless. Thus, for example, Mosher did not sue to recover $300,000 for "fabricated steel sold to the joint venture" as Union claims (Union Brief, p. 4). It sued to recover $300,000 for fabricated steel sold to Union. It did not contend that "Union, in addition to Dragor and IMI, was liable for payment" as Union claims (Union Brief, p. 4). It contended that Dragor, in addition to Union, was liable for payment. It was not seeking to hold Union "liable for the obligation of Dragor" as Union claims (Union Brief, p. 4). It was seeking to hold Union liable upon its direct, primary and individual promise to pay.

To establish the unfounded nature of almost all of Union's references to the supposed facts would be impossible within the confines of this brief. Nor would it serve to illumine any of the issues presented by this appeal.

Consequently, the Supreme Court properly ruled that, in voluntarily pleading a counterclaim which he was free to plead or not as he chose, a defendant necessarily submitted to the jurisdiction of the Court. Thus, it held:

> "... *the authorities agree that he is not concluded by the judgment if he does not plead his cross demand,* and *that whether he shall do so or not is left wholly to his choice.* (Citing cases) This single fact shows that the defendant, *if he elects to sue upon his claim in the action against him,* assumes the position of an actor and must take the consequences. The right to do so is of modern growth, and is merely a convenience that saves bring another suit, *not a necessity of the defense.*" (Italics ours.)

With the formulation by the United States Supreme Court of the Federal Rules of Civil Procedure, and particularly Rules 12 and 13 thereof, the views expressed in *Merchants* became obsolete wherever a compulsory counterclaim exists. Today, a defendant is no longer permitted a choice. He is no longer free to withhold a compulsory counterclaim and assert the same in a subsequent action before another forum. A compulsory counterclaim under Rule 13 *must* be pleaded, else it is forever lost. The coercion effected by Rule 13 obviates the consequences which previously attached to voluntary action, if the constitutional objection to *in personam* jurisdiction is asserted before, or when, the compulsory counterclaim is filed. It is still true, of course, that a defendant who files his compulsory counterclaim without asserting any objection whatsoever to the jurisdiction of the Court over his person, is deemed to have waived any opposition to the constitutional power of the forum.

Not a single decision now extant supports the argument advanced by Union (Brief, p. 22) that a defendant who vehemently and continuously objects to the *in personam*

jurisdiction of a District Court automatically submits to that jurisdiction if, his objections being overruled, he is forced to file a compulsory counterclaim. None of the cases cited by Union enunciating the so-called *"Merchants* principle" (Union's brief, p. 21) even remotely or inferentially supports any such view.

Texas & P. R. Co. v. *Eastin,* 214 U. S. 153 (1909), decided almost 30 years before the Federal Rules of Civil Procedure, simply held that defendants who voluntarily elected to file a cross bill against a third party in a state court action "invoked the jurisdiction of the state court on their own account and for their own purpose . . . (p. 159) *Freeman* v. *Bee Machine Co.,* 319 U. S. 448 (1943) merely held that a defendant served in a state court action, who removed the case to the Federal Court and, thereafter, *without any objection to the in personam* jurisdiction of the Court, defended on the merits and filed a counterclaim, "thus invoked the jurisdiction of the court and submitted to it" (p. 453). *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360 (1922) likewise ruled that a defendant who "was not obliged to set up and prove its action at law under Rule 30", when it did so, by its affirmative action, "waived its previous objection to the equitable jurisdiction of the Court. . . ."

The decisive and dispositive decision upon this subject under the Federal Rules of Civil Procedure, representing, to quote Union's language in its prior brief, authorities which "hold without exception that the pleading of a compulsory, as distinguished from a permissive, counterclaim constitutes no waiver of a previously asserted jurisdictional defense" (Union Statement, p. 22) is the decision of the Tenth Circuit in *Hasse* v. *American Photograph Corp.,* 299 F. 2d 666 (1962). As Judge Lewis there stated, that case squarely presented to the Court for determination the

question of "whether jurisdiction of the person was obtained in a case by appellant's claim to affirmative relief lodged against the plaintiff."

In that case, one White sued the American Photograph Corp. for the wrongful death of her husband, alleging the negligence of one Hasse, an employee of that defendant. The defendant then filed a third party complaint for indemnity against the appellant, the administrator of the estate of Francis Hasse, who had also been killed in the accident. The administrator was served under the Oklahoma long-arm statute by service upon the Oklahoma Secretary of State. The administrator thereupon answered, pleading that the Court was without jurisdiction of his person, and filing a cross complaint against the plaintiff for damages resulting from the death of his decedent. The Court reserved its ruling upon the jurisdictional issues and permitted the matter to be tried before a jury. The jury thereupon returned a verdict in favor of the plaintiff and "found no cause of action upon the appellant's cross complaint." The judgment was satisfied by the American Photograph Corp. and the Court granted a judgment in its favor against the appellant on its cross complaint.

The appellant administrator thereupon appealed, upon the ground that no jurisdiction of his person had ever been obtained by the Court below. The appellee contended that "lack of jurisdiction of the person was waived by appellant by the entry of a cross complaint against the plaintiff". Thus the issue was squarely joined in *Hasse,* an issue presented after a full trial before a jury, in which the appellant had endeavored to obtain a jury judgment against the plaintiff.

Notwithstanding these facts, certainly the strongest case which could possibly be urged to support the theory of

waiver and submission, the Tenth Circuit squarely ruled that "to hold that the defense of lack of jurisdiction over the person is waived by asserting a compulsory counterclaim would do violence to the purpose of Rule 12 in negativing the necessity of special appearances". In reversing the judgment of the Court below because of the absence of *in personam* jurisdiction, the Tenth Circuit held, in language directly applicable to the facts of the instant case (pp. 668-9):

> "Since appellant had no alternative but to submit his claim against the appellee along with his defense to appellee's complaint, *we hold that such compulsion did not constitute a waiver of his jurisdictional defense.*" (Italics ours)[5]

In *North Branch Products, Inc.* v. *Fisher,* 284 F. 2d 611 (Cir. Ct. D .C., 1960), cited at p. 22 of Union's brief, the Circuit Court held that the filing of a compulsory counterclaim constitutes a submission to the *in personam* jurisdiction of a Court *only if the filing defendant had failed to as-*

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[5] Union refers (Brief, pp. 12-13) to the deposition and document production sought by Dragor in April of 1965 *after* the compulsory counterclaim was filed and *before* Union's motion for a judgment of $1,037,500. was granted by the District Court. If a trial upon the merits would not constitute a waiver of the *in personam* jurisdictional objections previously asserted, depositions, interrogatories, motions to dismiss the complaint or other steps taken by the compulsory counterclaimant prior to trial would not do so. The authorities have so held. Thus, motions to dismiss on grounds other than lack of *in personam* jurisdiction, for more definite statements and interrogatories (*Martens* v. *Winder,* 341 Fed. (2d) 197 [9th Circ., 1965]); a motion to dismiss the complaint for legal insufficiency (*Elliott & Sons Co., Inc.* v. *Nuodex Products Co.,* 243 Fed. (2d) 116 [1st Circ., 1957]); a motion to dismiss the complaint, vacate an attachment and quash a garnishment (*Daris* v. *Ensign-Bickford Co.,* 139 Fed. (2d) 624 [8th Circ., 1944]); the taking of depositions (*Blank* v. *Bitker,* 135 Fed. (2d) 962 [7th Circ., 1943]); and the pleading of a counterclaim (*Sadler* v. *Penn. Refining Co.,* 33 Fed. Supp. 414 (1940) will not constitute a waiver of *in personam* jurisdictional objections.

sert his jurisdictional objections by motion or answer. Actually, as Union had advised this Court in its prior brief (Union Statement, pp. 23-24), *North Branch Products, Inc., supra,* "is in complete accord with the Tenth Circuit decision in Hasse." The remaining decisions cited by Union (Brief, p. 22) were all reviewed by the Circuit Court in *North Branch* and were all distinguished upon the ground that, in those cases, any objection to the *in personam* jurisdiction of the Court had been waived by the defendant's failure to assert such objection by motion or answer. Indeed, after discussing these cases, the Circuit Court emphasized the fact that "where the objection to service is filed with answer which includes counterclaim", cases such as *Keil Lock Co.* v. *Earl Hardware Manufacturing Co.,* D. C. S. D. N. Y. 1954, 16 F. R. D. 388 hold that the jurisdictional objection is not waived by the interposition of a compulsory counterclaim (284 F. [2d] 611, 615, footnote 8).

In Point I of our opening brief (pp. 19-24), we emphasized the fact that this Court's judgment of reversal on April 7, 1966 constituted a conclusive adjudication that the Arizona District Court never acquired, and could not lawfully exercise, any judicial jurisdiction over the person of Dragor in this lawsuit. As we there pointed out, the record before this Court upon the prior appeal from the judgment of June 1, 1965 disclosed every act performed by Dragor prior thereto, including the interposition of its *in personam* jurisdictional objections, and the filing of its compulsory counterclaim. Under the very authorities cited by Union herein, (*Merchants Heat & Light Co.* v. *Clow & Sons,* 204 U. S. 286) had Dragor performed any act or filed any pleading which constituted, singly or collectively, a waiver of its jurisdictional objections and a submission of its person to the jurisdiction of the District Court, this Court could not have reversed the judgment of June 1, 1965 and dismissed the complaint. Its reversal of that judgment constitutes an unassailable ad-

judication that Dragor's interposition of a compulsory counterclaim in this case, under the circumstances disclosed by the record, did *not* constitute a submission to the jurisdiction of the Court below, and did *not* confer any *in personam* jurisdiction upon the District Court. (*American Surety Co.* v. *Baldwin,* 287 U. S. 156, 53 Sup. Ct. 98).

Union's present thinly veiled attempt to reargue this Court's determination of the prior appeal is, of course, impermissible and cannot impair the final and definitive nature of this Court's prior adjudication. Union is not only barred and precluded from any attempt to relitigate "all issues actually raised and decided upon the final appeal but also as to those which could have been raised . . ." (*Angel* v. *Bullington,* 300 U. S. 183, 186, 187; 67 Sup. Ct. 657 [1947]).[6]

In an effort to avoid the *res judicata* effect of this Court's prior decision herein, Union has evolved the unprecedented thesis that that decision merely related to "the Court's authority to entertain a claim for relief against Dragor on Union's complaint"; (Union Brief, p. 19) that a completely separate issue is here presented; (Union Brief, p. 19) and that this appeal deals solely and only with the question of whether, "although found to be without jurisdiction to grant

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[6] Union's statement, constantly repeated in different form, that "Dragor lost all interest in securing an adjudication of its claim for relief" (Union Brief, p. 13) after the deposition of DeBolt is a calumny designed to prejudice Dragor in the eyes of this Court, precisely as it sought to do on the prior appeal. It was Union, as this court pointed out, who deliberately subjected Dragor to the "hardship of being hauled across the country to defend itself in a suit exclusively predicated upon claims arising in New York" (361 F. (2d) 43, 49). It was Dragor who insisted, from the very beginning, that the Arizona District Court never acquired jurisdiction over its person. It comes with little grace from Union to complain that Dragor, beleaguered by Union's assaults after the void judgment for $1,037,500. was entered, refused to participate in a trial *for fear that Union would repudiate its prior representations and advance the very "waiver" and "submission" contentions which it is now urging upon this appeal.*

relief on plaintiff's complaint", the District Court "may yet retain and adjudicate any counterclaim, compulsory or otherwise, provided such counterclaim is within the subject matter jurisdiction of the Court" (Union Brief, p. 24).

It is to this unique contribution to jurisdictional theory that we now turn our attention.

POINT III

Union's theory that jurisdiction *in personam* is divisible, partial and fragmentary, that *in personam* jurisdiction over a complaint is separate and distinct from *in personam* jurisdiction over a compulsory counterclaim, is completely untenable and fallacious as a matter of law.

The "preservation of a defendant's personal jurisdiction defense to a plaintiff's claim for relief" (Union Brief, p. 23), argues Union, "is not to be confused with the jurisdiction of the Court to hear and decide Dragor's claim against Union." (Union Brief, p. 12).

Thus, in Union's view, the person of a defendant can, at one and the same time, and before one and the same tribunal, be and not be subject to the *in personam* jurisdiction of the District Court. It is a view which has never before been advanced in this or any other Court. Nor can a single word from any decision, text or commentator be summoned for its support. It is a theory, moreover, which would completely vitiate and destroy Rule 12, F.R.C.P. Obviously, it would be impossible, ever, in any case, to preserve a defendant's *in personam* jurisdictional objection if, when erroneously overruled and the filing of a compulsory counterclaim thereby coerced, he is automatically subjected to the jurisdiction of the Court, no matter how meticulously

he has sought to preserve his constitutional objections under Rule 12.[7] Jurisdiction by error would replace the constitutional mandate of jurisdiction by due process.

None of the authorities cited by Union, commencing with *Vidal* v. *South American Securities Co.*, 276 F. 855 (2nd Cir., 1922) and ending with *Haberman* v. *Equitable Life Assurance Society,* 244 F. (2d) 401 (5th Cir., 1955) even remotely hints at the existence of so bizarre a jurisdictional hybrid, the half-in and half-out jurisdiction *in personam* thesis which Union has here espoused.

The foundation of *in personam* jurisdiction is "the physical power" of a sovereign over the person of any individual found within its territorial borders, "although in civilized times it is not necessary to maintain that power throughout proceedings properly begun" (*McDonald* v. *Mabee,* 243 U. S. 90, 91). In any consideration of *in personam* jurisdiction, its foundation must be "borne in mind" (*McDonald* v. *Mabee, supra,* p. 91). Legally, philosophically or pragmatically, it is impossible to conceive of the exercise of physical power by a sovereign over only part of a person in only part of a lawsuit. It is, juridically, as palpable an anomaly as, in other contexts, a people "half slave and half free" or "a house divided against itself."

Either *in personam* jurisdiction exists as a totality or it does not exist at all. If, by the interposition of its compulsory counterclaim, under Rules 12 and 13, F.R.C.P., Dragor had subjected itself to the physical power of the Arizona District Court for any purpose, it would have subjected it-

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[7] Union complains petulantly that Dragor "even obtained a ruling by the Court below that the counterclaim was legally sufficient" (Brief, p. 12). It was Union who moved to dismiss the compulsory counterclaim for legal insufficiency; Dragor who defended it. No court has ever ruled that a defendant waives his previously asserted personal jurisdictional objections by opposing a motion to dismiss a compulsory counterclaim which the defendant had been forced to file.

self to that power for all purposes. But that issue has already been determined adversely to Union by this Court's prior decision, upon a record which included the existence of Dragor's compulsory counterclaim, as well as the very judgment of dismissal herein appealed from.

None of the cases cited by Union furnish any basis whatsoever for so fanciful a hypothesis. In each of them, the plaintiff had commenced an action in the District Court. By commencing the action, the plaintiff had irrevocably submitted his person to the *in personam* jurisdiction of the Court, regardless of the Court's subsequent disposition of his complaint.

Thus, in *Sachs* v. *Sachs,* 265 F. (2d) 31, cited by Union at pp. 30-31, Judge Maris emphasized the fact:

> "And here the plaintiff, having submitted himself to the jurisdiction of the district court by filing his complaint and appearing therein, put it within the power of the court to render a personal judgment against him on the counterclaim. Adam v. Saenger, 1938, 303 U. S. 59; 58 Sup. Ct. 454, 82 L. Ed. 649."

Similarly, Judge Groner, in *Isenberg* v. *Biddle,* 125 F. (2d) 741 at 744, underscored the fact that:

> "In the present case, Isenberg came into the District Court to assert a claim against the United States. When he did so, he submitted himself completely to the jurisdiction of the court that justice might be done with regard to the entire subject matter. General Electric Co. v. Marvel Rare Metals Co., 287 U. S. 430, 435; 53 S. Ct. 202; 77 L. Ed. 408."

Again, Judge Major, in *Switzer Bros., Inc.* v. *Chicago Cardboard Co.,* 252 F. (2d) 407, 411 (7th Circ., 1958) stressed the fact that the plaintiffs "were in Court by their

own voluntary action" and that the plaintiffs "voluntarily submitted themselves to the Court's jurisdiction."

In each of the cited cases, the *defendant* had appeared *without any objection* to the *in personam* jurisdiction of the District Court and had filed a counterclaim seeking affirmative relief against the plaintiff. In each, the plaintiff's suit was defective for want of subject matter jurisdiction or the lack of indispensable parties. Thus, in *Sachs,* the Court held that, "because the plaintiff was domiciled in Massachusetts at the commencement of the action and not in the Virgin Islands", the District Court "was without jurisdiction to entertain his complaint and it was properly dismissed." Similarly, in *Isenberg*, the complaint was dismissed because of the absence of subject matter jurisdiction. Likewise in *Vidal, Pioche Mines Consol., Switzer Bros.* and *Haberman,* the plaintiff's complaint could not be entertained by the District Court because of the lack of subject matter jurisdiction, the absence of indispensable parties or a statutory prohibition.

In each of those cases, except *Haberman,* it was *the plaintiff* who, after his complaint had been dismissed, sought a dismissal of the counterclaim even though (a) he had himself invoked the *in personam* jurisdiction of the District Court by the institution of his action; (b) the defendant had never objected to the Court's jurisdiction over his person; (c) the defendant's counterclaim was within the *in personam* and subject matter jurisdiction of the Court; and (d) it was the defendant who insisted upon its continuance. Necessarily, then, the Court, in each instance, overruled the objection of the plaintiff and permitted the counterclaim to proceed at the behest of the defendant. In *Haberman,* the defendant pressed his counterclaim for trial without asserting any *in personam* jurisdictional objection. It was only *after* he was defeated at the trial upon the merits

that he advanced his jurisdictional objection *for the very first time.* Obviously, it was much too late.

None of these considerations pertain in the instant case. In the instant case, the plaintiff's failure was not a failure of subject matter jurisdiction but a failure of *in personam* jurisdiction over the defendant. In the present case, the defendant never submitted to the *in personam* jurisdiction of the District Court. In the present case, the defendant did not voluntarily file a counterclaim. In the present case, the defendant adamantly opposed the continuance of the compulsory counterclaim. And finally, in the present case, neither jurisdiction *in personam* exists nor has diversity been alleged in the compulsory counterclaim.

It should be noted, in this connection, that Dragor's compulsory counterclaim does not contain any allegation of diversity. (R. 1, pp. 98-105). The omission was deliberate. It is also fatal to any claim that the compulsory counterclaim possesses an independent jurisdictional base. "Jurisdiction *must exist* within the scope of the *allegations* of the counterclaim . . . " (*Manufacturers Cas. Ins. Co.* v. *Arapahoe, Drilling Co.,* 267 F. [2d] 5, 8; 10th Circ., 1959). Because the requisite jurisdictional fact has not been pleaded, the compulsory counterclaim does not present, independently, a claim cognizable by a Federal Court. (*Ivey* v. *Frost,* 346 F. [2d] 115; Rule 8[a][1], F.R.C.P.; Moore's Federal Practice, Vol. 2, §8.07, pp. 1639-1640; Vol. 2, §4.02 [3], p. 953.) We did not propose to furnish Union with the slightest pretext for the claim that the compulsory counterclaim set forth an independent, rather than ancillary, jurisdictional base and was therefore jurisdictionally independent of the complaint, should the latter be dismissed. "But plainly, when jurisdiction is lacking over the primary suit, the defect cannot be cured by a counterclaim of which the court also lacks jurisdiction." (*Goldstone* v. *Payne,* 94 F. [2d] 855, 857; 2nd Circ., 1938).

CONCLUSION

A word of caution and warning must here be uttered, less Union be "hoist by its own petard." If, inconceivably, Dragor's compulsory counterclaim is deemed to have been voluntarily interposed, then Union was obligated, under Rule 13 F.R.C.P., to plead the claim set forth in its dismissed complaint as a compulsory counterclaim in its reply to the compulsory counterclaim filed by Union. (*Great Lakes Rubber Corp.* v. *Herbert Cooper Co.*, 286 Fed. (2d) 631, 3rd Circ., 1961). Its failure to do so, prior to the entry of the District Court's judgment on December 7, 1965, would constitute a waiver which will bar Union forever from attempting to enforce the same.

It is respectfully submitted that the judgment appealed from be reversed and Dragor be permitted to discontinue its compulsory counterclaim without prejudice.

Respectfully submitted,

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Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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